IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 643 of 1997
with
CRIMINAL APPEAL No 712 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order mBade thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

PRAHLADGIRI KARSANGIRI GOSWAMI
Versus
STATE OF GUJARAT

Appearance:
Criminal Appeal No.643 of 1997 :
Mr.M.C. Barot with MR RC JANI for the appellant.
Mr.K.T. Dave, ADDITIONAL PUBLIC PROSECUTOR for the respondent.

Criminal Appeal No.643 of 1997 :

None appeared for the appellant.
Mr.K.T. Dave, ADDITIONAL PUBLIC PROSECUTOR for the respondent.

CORAM : MR.JUSTICE KSHITIJ R.VYAS

and

MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 08/04/2002

ORAL JUDGEMENT (Per : MR.JUSTICE RAVI R.TRIPATHI)

Criminal Appeal No.643 of 1997 is filed by Prahladgiri Karsangiri Goswami, original accused no.1 in Special Case No.281 of 1996, while Criminal Appeal No.712 of 1997 is filed by Lalubhai Chhaganbhai Mir, original accused no.2 of the same case.

2. Both these appeals filed under section 374(2) of the Code of Criminal Procedure, 1973 are directed against the judgement and order dated 31.5.1997 rendered by the learned Additional Sessions Judge, Banaskantha at Palanpur, by which appellant of Criminal Appeal No.643 of 1999 was convicted in Special Case No.281 of 1996 under sections 17 and 18 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as "NDPS Act") and was punished with rigorous imprisonment for 10 years and fine of Rs.1 lakh, in default to further undergo simple imprisonment for two and half years. Whereas the appellant of Criminal Appeal No.712 of 1997 was convicted under sections 17 & 18 read with section 29 of the NDPS Act with rigorous imprisonment for 10 years and a fine of Rs.1 lakh, in default to further undergo simple imprisonment for two and half years.

3. On 7.9.1996, Mr.P.M. Jadav, who was then discharging duties as Police Inspector in the State Narcotics Cell, C.I.D. Crime, Gujarat State, Ahmedabad had received information from one Police Constable, Shri Paragbhai Vajabhai Parmar that original accused nos.1 and 2 were in possession of opium illegally and were selling the same. On receiving the said information, necessary entry was made in the register and after conveying the information to the Superintendent of Police, Narcotic Cell, a raid was arranged in presence of Panchas. The raiding party proceeded to the place. They reached Sihori Rest House, where two persons were called to be the Panch witnesses. They were intimated about the raid. The Panch witnesses, the Police personnel, the Government as well as private vehicles were searched and nothing objectionable was found. Raiding party along with the Panch witnesses and the staff members of the Police started from the rest house, after making a preliminary Panchnama, which is produced at exhibit 20, duly signed by both the Panchas. The raiding party reached 'Dev Darbar Na Patiya' on the road leading from Thara to

Deodar. They inquired at the road side hut where a man was preparing tea. He informed his name to be Savabhai Punabhai Mir, resident of Vibha Nesda Village. He was then inquired about Prahladgiri Karsangiri, resident of village Varsada and Lalubhai Chhaganbhai Mir, resident of village Chemla. He pointed out two persons sitting on a cot at the distance of about 10 ft. The raiding party immediately surrounded them and asked them to be seated as it is and inquired their names. One of them stated his Prahladgiri Karsangiri Goswami of village Varsada, who was having a white plastic heavy bag in his lap. Second person, on inquiry, named himself as Lalubhai Chhaganbhai Mir, resident of Chemla. Both these persons were informed that the raiding party has information that both these persons are keeping illegal opium and are trading in the same and that they are to be searched. P.I. Mr.Jadav introduced himself along with accompanying P.I. Shri Pathan being Gazetted Officers and the other members of the raiding party as Police personnel informed orally as well as in writing that still if they want to be searched in presence of any other gazetted officer or a Magistrate, the same can be arranged. The accused denied to call any other gazetted officer or the Magistrate. Thereafter, a plastic bag, which was in the lap of Prahladgiri Karsangiri, accused no.1, pieces of plastic were found and below that round and semi circular shaped black-brownish substance was found. On smelling the same in presence of Panchas, it was found to be smelling like opium. On counting, in all, 96 pieces were found. Some of the pieces were marked with English letter, 'R'. On weighing the said substance with the weighing scale by Police Constable Paragbhai Vajabhai, it was found 4 KG and 700 Grams. Five pieces bearing mark 'R' were taken as sample and on weighing them it was 210 grams. Said pieces were placed in a tin box after closing it, the same was wrapped in a paper. Remaining 91 pieces remained in the same plastic bag. The plastic bag was stitched and it was also wrapped in a paper. Said plastic bag was placed in a tin box which was then tied with a string after placing a slip bearing signatures of the Panchas and that of P.I. Shri Jadav. A chit was tied and the tin box was applied with a wax seal bearing mark, 'P.I., NDPS, GS, C.I.D. Crime, Ahmedabad'. Opium weighing 4 KG, 700 grams, valued at Rs.1,87,000/-, was seized. A sum of Rs.170/-, was recovered from accused no.1 and a sum of Rs.150/-, was recovered from accused no.2. Both the accused were given seizure memo about the opium and cash recovered. On inquiry none of the accused had any pass or permit for possessing the said opium. Therefore, they were arrested and were intimated about the same. A detailed Panchnama

was drawn. A forwarding note was also prepared for sending the sample Muddamal to the Forensic Science Laboratory (FSL). Thereafter, along with both the accused and the Muddamal, the raiding party started for Ahmedabad and on reaching Ahmedabad the papers, Muddamal and the accused were handed over to PSI Mr.M.N. Patel for registering an offence and for carrying out further investigation. Mr.M.N. Patel registered an F.I.R. and undertook investigation. Muddamal sample in sealed condition with a forwarding letter (note) was sent to FSL, Ahmedabad. A receipt issued by FSL was kept in record. The investigation was then handed over to P.I. Shri N.N. Pathan. On receipt of a report from FSL and on completion of the investigation, the appellants were charge sheet for offence punishable under sections 17 & 18 of the NDPS Act in the City Sessions Court, Ahmedabad.

4. The learned Judge had framed charges at exh.7 against the accused for the offences punishable under sections 17 & 18 read with section 29 of the NDPS Act. The charge was read over and explained to the accused who pleaded not guilty to the same and hence tried for the same. The prosecution examined PW 1, exh.12 Merajkhan Sohelkhan, a Panch witness; PW 2, exh.14, Arjanji Chhaganji, a Panch witness; PW 3, exh.19, Manharprasad Nagardas Patel, PSI, State Narcotic Cell, CID, Ahmedabad; PW 4, exh.24, Prakash Mahendra Jadav; PW 5, exh.37, Sahebkhan Aladkhan, Ist Grade Jamadar, the person who had taken sample Muddamal to FSL; PW 6. exh.38, Hirabhai Lalabhai, Head Constable, State Narcotic Cell, CID Crime, Ahmedabad, one of the members in the raiding party; PW 7, exh.39, Najir Ahmedkhan Nasibkhan N.N. Pathan, P.I. at the relevant time serving in the NDPS Cell, CID Crime, Ahmedabad.

The prosecution also produced documentary evidence, such as, the entry made in the register at the Police Station regarding information received, exh.25; report made by the Police Inspector to the Superintendent of Police, State Narcotic Cell, CID Crime, Ahmedabad, exh.36; intimation given to accused no.1 by P.I. Mr.Jadav, for compliance of section 50, exh.26; intimation given to accused no.2, Lalubhai by P.I. Mr.Jadav for compliance of section 50, exh.27; the grounds of arrest informed to both the accused for compliance of section 52(1) of the NDPS Act, exhibits 32 & 33; Forwarding letter/ note sent to FSL with sample muddamal, exh.34; FSL report, exh.40.

5. After recording of evidence of the prosecution witnesses was over, the learned Judge explained the appellants the circumstances appearing against them in

the evidence of the prosecution witnesses and recorded their statements under section 313 of the Code of Criminal Procedure, 1973. In their statements, the appellants denied the case of the prosecution, but did not lead any evidence in support of their defence that the case of the prosecution was false.

6. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that the appellants were found in possession of 4 KG and 700 grams of opium near 'Dev Darbar Na Patiya' and that they had committed offences punishable under section 17 as well as section 18 of the NDPS Act. The learned Judge concluded that it was proved by the prosecution that mandatory provisions of the NDPS Act were complied with and the appellants could not satisfy the Court that there was breach of any of the mandatory provisions of the NDPS Act. After holding that the appellants had committed offences punishable under sections 17 & 18 of the NDPS Act, the appellants were heard regarding punishment as required by section 235(2) of the Code of Criminal Procedure, 1973. The accused did not make any submission. The learned Additional Public Prosecution Mr.K.T. Dave submitted that the accused are professional and are indulging in the activities of selling opium, which is a crime against the whole society and therefore, they should be severely punished by awarding maximum punishment. The learned Judge punished the accused by judgement and order dated 31.5.1997, against which the present appeals are preferred.

7. Mr.Barot, the learned counsel with Mr.R.C. Jani, learned advocate appearing for the appellant in Criminal Appeal No.643 of 1997 filed by original accused no.1, strenuously submitted that the prosecution has falsely implicated the appellant. Nobody appeared for the appellant in Criminal Appeal No.712 of 1997. However, we have examined the case qua him also. Mr.Barot submitted that though the raid was carried out at a place near 'Dev Darbar Na Patiya' situated on the road leading from Thara to Deodar, is in the district of Banaskantha, the raiding party carried the papers, Muddamal and the accused to Gandhinagar. Mr.Barot submitted that from perusal of the scheme of the NDPS Act it is clear that so far as the search, seizure and arrest are concerned, the Act has given power not only to Police personnel but also to the officers of various other departments, like the Department of Central Excise, Narcotics, Customs, Revenue Intelligence, the Border Security Force, etc. who may be empowered in this behalf by a general or special order of

the Central Govt. or the State Govt. In fact the Act the Act has gone to the extent of saying that, 'any officer subordinate to the officers mentioned in section 41, but superior in rank to a Peon, Sepoy or Constable', are given power of search, seizure and arrest even without warrant or authorisation under section 42 and 43 of the Act. But then once the search, seizure and arrest is over and the matter comes to investigation, it is to be handed over to the officers in charge of the nearest Police Station or the officer empowered under section 53. He submitted that in the present case a clear violation of the scheme laid by the NDPS Act is committed. The officers who carried out the raid took papers, muddamal and the accused to Gandhinagar Zone Police Station. They did not hand over the same to the nearest Police Station.

7.1 Mr.Barot also submitted that section 36 of the NDPS Act provides for constitution of special courts and in section 36A, the offences triable by special courts are mentioned. He forcefully submitted that, the idea behind these provisions coupled with sections 52 & 55 is to see that both the limbs, namely, the limb carrying out search, seizure and arrest be different than the limb carrying out investigation. He submitted that in the present case the members of the raiding party thought it fit to take the accused to a Police Station which is far away from the place of occurrence. Not only that Mr.P.M. Jadav, P.I., NDPS Cell, CID Crime, Ahmedabad handed over the papers to Mr.M.N. Patel, Police Sub Inspector, NDPS Cell, CID Crime, Ahmedabad to register the crime and investigate (who was with the raiding party) which was subsequently entrusted to Mr.N.N. Pathan (who was one of the members of the raiding party) who then carried out the investigation. He submitted that thus, the matter remained with the Police officers who were the members of the raiding party. Therefore, prejudice is caused to the accused.

7.2 Mr.Barot submitted that there is a non compliance of the provisions of sec.52(3) of the NDPS Act, inasmuch as the person arrested and the article seized in the present case were not forwarded to the officer in charge of the nearest Police Station.

7.3 He submitted that there was breach of the provisions of sec.55 also. He submitted that in view of the fact that the matter remained in the hands of the personnel of the raiding party even for investigation, it should be held that even if there was no breach of law in words, definitely there was breach of law in spirit. The conviction of the accused based on such material is

required to be quashed and set aside by this Court.

8. Mr.Barot relied upon the judgement of this Court in the matter of Shivabhai Gajmalbai v. State of Gujarat, reported in 1996(2) GLR 64. He also relied upon the judgement of the Honourable Apex Court in the matter of Bhagwan Singh v. State of Rajasthan reported in AIR 1976 SC 985 and the judgement of the Honourable Apex Court in the matter between Megha Singh v. State of Haryana, reported in AIR 1995 SC 2339 and the judgement of Rajasthan High Court in the matter of Nathiya & another v. the State, reported in 1992(1) Crimes 537.

9. Mr.K.T. Dave, learned Additional Public Prosecutor submitted that the submissions made by the learned counsel appearing for the appellant in Criminal Appeal No.643 of 1997, filed by original accuse no.1 are devoid of any merit. He fully supported the judgement and order of conviction and sentence awarded by the learned Additional Sessions Judge, Banaskantha at Palanpur. Mr.Dave, learned Additional Public Prosecutor submitted that in the present case the raid was carried out by the officers of Gandhinagar Zone Police Station and that the said Police Station is established by the Home Department of State of Gujarat by notification dated 18.2.1980 issued in exercise of powers conferred under clause(s) of section 2 of the Code of Criminal Procedure, 1973 and on appreciation of Government Notification issued by Home Department bearing No.GG/ 24/ POS/ 1077-214 C dated 12.2.1979, the Govt. of Gujarat declared places specified in column 2 of Schedule appended to the aforesaid notification to be a Police Station and directed that each of such Police Station shall include areas specified in column 3 of the said schedule. A copy of the notification is at page 103 of the Paper Book.

9.1 Mr.Dave, the learned APP submitted that under the notification, office of the Deputy Superintendent of Police, C.I.D. Crime, known as Gandhinagar Zone Police Station is having jurisdiction over the area mentioned in column 3, which includes Ahmedabad City, Ahmedabad Rural, Gandhinagar, Mehsana, Banaskantha, Sabarkantha and Kheda districts and jurisdiction of Western railway in Gujarat State. Learned APP submitted that in the present case as the raiding party had gone from 'Gagndhinagar Zone Police Station', there was no reason for it to hand over the accused, the muddamal and the papers to the officer of any other Police Station. He submitted that the said provision is applicable to the officers who do not belong to 'Police' Department and therefore, do not have their

own Police Station. According to him they had rightly brought everything to Gandhinagar Zone Police Station and handed over to Mr.M.N. Patel, PSI, who was also the Police Station in- charge in his dual capacity. He submitted that merely because the 'Police Station in charge' accompanied the raiding party, he does not cease to be 'Police Station in- charge'. He submitted that Gandhinagar Zone Police Station is established under the aforesaid notification, when the matter was required to be investigated, PSI Mr.M.N. Patel requested the Supdt. of Police to hand over the investigation to an officer of the rank of Inspector. Subsequently, investigation was handed over to Mr.N.N. Pathan.

9.2 Mr.Dave, the learned APP submitted that Mr.Pahtan had also accompanied the raiding party. But then what is to be seen is whether any prejudice is caused to the accused. Merely because investigation was carried out by an officer, who happens to be the member of the raiding party, it cannot be said that the investigation is bad. Mr.Dave explained that the judgement of the Honourable the Apex Court and that of Rajasthan High Court relied upon by Mr.Barot are not applicable to the facts of this case. He further submitted that in both the cases the decision of the Court is in recommendatory form. According to Mr.K.T. Dave, it is not laid down as an absolute proposition of law that the officer who is the complainant must not investigate or that the member of the raiding party shall not undertake the investigation. He submitted that it being recommendatory in nature and not the mandatory one. The underlying theme of such recommendation is that to avoid any prejudice being caused to the accused. In each case the Court has to take into consideration as to whether any prejudice is caused to the accused and as far as possible these recommendations be carried out. He submitted that in the present case, it is neither pleaded nor proved that any prejudice is caused. Mr.Dave, the learned APP while replying to the contentions raised by Mr.Barot submitted that it is true that in the present case the trial has taken place in Banaskantha district after it was transferred on an application given by his counterpart. But then the said trial is not vitiated on any ground. Even Mr.Barot did not assail the trial on any ground. Mr.K.T. Dave relied upon a judgement of the the Honourable Apex Court in the matter of State of Karnataka v. Kuppuswamy Gownder reported in AIR 1987 SC 1354. Mr.Dave relied upon para 15 of the said judgement, which reads as under:

"It is therefore, clear that even if the trial

> before the III Additional City Civil and Sessions Judge would have been a Division other than the Bangalore Metropolitan Area for which III Additional City Civil and Sessions Judge is also notified to be a Sessions Judge still the trial could not have been quashed in view of S.46. This goes a long way to show that even if a trial takes place in a wrong place where the Court has no territorial jurisdiction to try the case still unless failure of justice is pleaded and proved, the trial cannot be quashed. in this view of the matter therefore, reading S.462 along with S.465 clearly goes to show tat the scheme of the Criminal P.C. is that where there is no inherent lack of jurisdiction merely either on the ground of lack of territorial jurisdiction or on the ground of any irregularity of procedure an order or sentence awarded by a competent court could not be set aside unless a prejudice is pleaded and proved which will mean failure of justice. But in absence of such a plea merely on such technical ground the order or sentence passed by a competent Court could not be quashed."

9.3 It is clear from the aforesaid para that the Honourable Apex Court has clearly held that it is only when the matter is tried by a court of no competence, the trial stands vitiated, but in a case when a court is not having territorial jurisdiction, the trial will not be vitiated. It will only be an irregularity for which until a positive prejudice caused to the accused is shown the trial stands and the same is not required to be quashed and set aside.

10. In the present case it has come on record that Mr.P.M. Jadav, P.I., Narcotic Cell, Ahmedabad who is examined as PW 4 at exh.24 has deposed that on 7.9.1996 when he was present at his office, Police Constable Paragbhai Vajabhai Parmar from his own Cell, i.e. Narcotic Cell had informed at 11.00 AM that, he was informed by his informant that near Dev Darbar Na Patia, in the sim of Village Rajpur, there is a tea kettle. There Prahladgiri Karsangiri, resident of Village Varsada and Lalubhai Chhaganbhai Mir, resident of Village Chhemla, trade in illegal opium between 6.00 PM and 7.00 PM. On receipt of this information, the same was recorded by P.I. in the information register of the Narcotic Cell, a copy of which is produced on record at exh.25. He also intimated the said information to the Supdt. of Police of the Narcotic Cell, a copy of which is produced at exh.36. Thereafter, the said P.I. along

with the other Police personnel of the said Cell, namely, Police Inspector N.N. Pathan, PSI M.N. Patel, Head Constable Kapadia, Constable Paragbhai along with SRP personnel at 12.30 PM proceeded in Govt. and private vehicles to the place. The xerox copy of entry about raid pertaining NDPS Act, which is in the hand writing of the P.I. is exhibited at exh.25. They reached Shihori Rest House, where two Panchas were called and were informed about the 'information'. The Panchas, Police personnel, Govt. and private vehicles were searched and nothing objectionable was found. Thereafter, they started for the raid. From the evidence on record it is clear that there was compliance of section 41(2) wherein it is provided that,

".. .. or information given by any persons and taken in writing .. .."
(emphasis supplied)

10.1 As is contended by Mr.Barot that, 'after the raid the members of the raiding party did not hand over the papers, the muddamal along with the accused persons to the Officer In-charge of the nearest Police Station'. Perusal of the evidence reveals that after the raid was over, i.e. after the accused were arrested with offending substance, i.e. opium, necessary procedure to inform the accused as to whether they will like to be searched in presence of any other gazetted officer was followed, an intimation was given to that effect to accused nos.1 & 2, which is produced at exh.26 & 27 of the record. Not only that they were also intimated about the grounds of seizure which are produced at exh.31 & 32. After the raid was over, accused nos.1 & 2 were brought to Gandhinagar (Ahmedabad) Zone Police Station, to which the members of the raiding party belonged. They brought the papers, muddamal and the accused to that Police Station and thereafter, P.I. handed over the papers, muddamal and the accused to PSI Mr.M.N. Patel, who was the Police Station in- charge, over and above a member of the raiding party, for registering the offence and for further investigation into the matter. There is categorical assertion to that effect in the deposition of P.I. Prakash M. Jadav, PW4, who is also the complainant in this case. Mr.M.N. Patel, PW3, exh.19 and Mr.N.N. Pathan, P.I., PW 7, exh.39 have also deposed on the same line. It is also on record that after the offence was registered by Mr.M.N. Patel, PSI, who was given a report by Mr.P.M. Jadav, P.I., the complainant, a copy of the report dated 7.9.1996 given by Mr.P.M. Jadav, P.I. is produced at exh.43, it is addressed to Police Sub Inspector, NDPS Cell, CID Crime, Ahmedabad, Gandhinagar

Zone Police Station. The said report also bears an endorsement that the crime is registered C.R. No.II-- 10 of 1996 at 4.00 PM on 8.9.1996. Said report also incorporates the names of the two accused persons, the details of muddamal to the effect that there were 96 pieces of opium of which 5 pieces were taken as sample and that both are separately sealed; the sample in tin box and the muddamal in plastic bag. It is also mentioned that a sum of Rs.170/-, was recovered form accused no.1 while a sum of Rs.150/-, was recovered from accused no.2.

11. From the deposition of Mr.M.N. Patel, it is clear that out of the Muddamal which was handed over to him by Mr.P.M. Jadav, sample muddamal was sent to Forensic Science Laboratory on 10.9.1996 through PW 5, exh.37, Sahebkhan Alladkhan, Ist Grade Jamadar, and the remaining muddamal was sent to the Court. PW 5 has deposed that on 10.9.1996 when he was discharging his duties in the office of the Narcotic Cell, PSI Shri M.N. Patel, Gandhinagar Zone, sent muddamal of C.R. No.10 of 1996 of NDPS under sections 17, 18 and 29 of NDPS Act, which contained in tin boxes wrapped in a paper on which there was a chit bearing the signatures of Panchas and was bearing a seal, muddamal was sent along with a forwarding note. PW 5 has stated that he had handed over the said muddamal sample to Forensic Science Laboratory, Ahmedabad and he was given a receipt of Forensic Science Laboratory, which was handed over by him to PSI Shri Patel. PW 5 has also stated that he was shown exh.22, which is the receipt issued by Forensic Science Laboratory, Ahmedabad and that was signed by him in token of having received the same and date was also mentioned in that. PW 5 has also stated that he had given the original copy of exh.34, the forwarding letter to Forensic Science Laboratory, Ahmedabad. It is also clear from the documents of the Forensic Science Laboratory, that the sample muddamal was received by Forensic Science Laboratory authorities in sealed condition. The report of the Forensic Science Laboratory is at exh.40 wherein it is mentioned that what is received by the Forensic Science Laboratory is a sealed parcel tied with white paper, there was a seal bearing inscription reading, "P.I., NDPS, CID Crime, G.S. Ahmedabad" in English. It is also mentioned in the same report that the seal is intact and the same is is according to specimen forwarded to the Forensic Science Laboratory. Thus, so far as the reaching of the sample to Forensic Science Laboratory is concerned, the same was found to be in 'intact' position bearing the seal, the specimen of which is sent to Forensic Science Laboratory.

11.1 The question which is urged by Mr.Barot is about handing over of the persons arrested and the articles seized according to section 52(3) of the NDPS Act to the officer in charge of nearest Police Station. Section 52 provides for disposal of persons arrested and articles seized. Subsection (3) of section 52 reads as under:

"52(3) Every person arrested and article seized under subsec.(2) of sec.41, sec.42, sec.43 or sec.44 shall be forwarded without unnecessary delay to ---

(a) the officer in charge of the nearest police station, or

(b) the officer empowered under sec.53."

12. We are not in agreement with the submission made by Mr.Barot that the words, "officer in charge of the nearest Police Station" should be construed to mean "physically nearest" Police Station. In the present case the raiding party was from Gandhinagar Zone Police Station, which is under CID Crime, Ahmedabad. Therefore, the raiding party on seizure of the articles and arrest of persons (the accused in this case) brought them to Gandhinagar Zone Police Station and handed over to PSI, Mr.M.N. Patel, who was also the officer in charge of the Police Station, which is clearly borne from the exh.43 in this case. The Police Station which is established under Notification dated 18.2.1980 at the place, "Office of the DSP, C.I.D. Crime, Gandhinagar", had jurisdiction over Banaskantha District and once the members from a particular Police Station carried out raid, their report to their own Police Station is nothing abnormal or uncommon, which may give rise to a cause to disbelieve their deposition.

12.1 At the time of initiation of trial, the learned Public Prosecutor appearing in the matter had filed a Purshis to transfer the matter to the Court of the learned Sessions Judge, Banaskantha at Palanpur. It is argued by the learned advocate that this fact should help the accused and it should be held that the conviction in the present case is bad. Merely because such a Purshis was filed will not render the raid carried out by the raiding party, the Police personnel of C.I.D. Crime Branch under whose jurisdiction 'Gandhinagar Zone Police Station' is situated, as illegal. The raid which was otherwise carried out complying with all necessary provisions of the NDPS Act will not get vitiated or

negated only on account of the trial being transferred to the Sessions Court of Banaskantha district.

13. So far as submissions of Mr.Barot regarding the constitution of special courts under sec.36 and the offences triable by special courts under sec.36(A) is concerned, the same have no substance. In the State of Gujarat, no special courts are established, the sessions court is given power to conduct trial under the Act. In the present case it is true that the case would have been tried at Ahmedabad City Sessions Court, but on an application, given by the learned Public Prosecutor, it was transferred to the Sessions Court, Banaskantha district. In absence of any challenge to the trial from the accused, there is no question to hold that the said transfer is the conclusive proof of the raiding party, having no jurisdiction to carry out the raid. The raid does not stand vitiated only because the trial was conducted by the sessions court of Banaskantha district. If it is so held it will definitely result into miscarriage of justice. It is the settled position of law that if the trial is conducted by 'the competent court', in the present case offence is triable by a court of sessions, and it is tried also by a court of sessions, then merely because instead of City Sessions Court, Ahmedabad, it is conducted by the Sessions Court, Banaskantha district, the trial is not rendered nugatory. In absence of any pleading or proof of any breach being caused to the accused, the same does not get vitiated and the contentions raised by Mr.Barot are required to be rejected and the same are rejected.

14. So far as the next contention of Mr.Barot that the investigation is carried out by the persons who were also the members of the raiding party, is not found with any merit. It is on the record of the case that the raid was carried out by the Police personnel of NDPS Cell which is under the C.I.D. Crime, Ahmedabad of Gandhinagar Zone Police Station. The raid was carried out by P.I. Mr.D.M. Jadav, PW 4. After the raid was over, he handed over the papers to PSI Mr. M.N. Patel, who was the officer in charge of the Police Station. It is true that Mr.M.N. Patel was also a member of the raiding party, but then it being a special cell of Narcotics and in view of the fact that the said cell is manned by particular officers, until it is shown that any prejudice is caused to the accused, only because the officer who is in charge of the Police Station was also a member of the raiding party, a presumption about prejudice cannot be raised. It is on record that the said officer in charge of Police Station after having

registered the offence had written a letter to the Supdt. of Police requesting him to hand over investigation to the officer of the rank of P.I. Accordingly, the Supdt. of Police directed Mr.N.N. Pathan, P.I., NDPS to investigate the matter. It is also on record that Mr.N.N. Pathan, P.I., NDPS, C.I.D. Crime, Ahmedabad was also a member of the raiding party but then this does not render the investigation futile until it is pleaded and proved that a specific prejudice was caused to the accused.

14.1 Mr.Dave, the learned APP submitted that none of the three decisions relied upon by Mr.Barot have any application to the facts of the present case. Starting with the decision of the Rajasthan High Court in the matter of Nathiya & another reported in 1992(1) Crimes 536 (supra) the Court did not hold that the investigation is vitiated on the sole ground that investigation was by the same officer. In fact it was on account of breach of mandatory provisions of NDPS Act that the court was pleased to hold that, 'the conviction of the accused is bad in law'. In the present case if all the mandatory provisions of the NDPS Act are complied with and investigation carried on by the Investigating Officer is fair and no prejudice is caused to the accused as the accused have not pointed out any prejudice caused to them. Said decision cannot have any application. Merely because a member of the raiding party was entrusted with the investigation by the Superintendent of Police as no other officer was available for investigation, it cannot be held that the investigation is bad.

14.2 The judgement of the Apex Court in the matter of Bhagwan Singh reported in AIR 1976 SC 985 (supra) also does not lay down a bare proposition of law to the effect that, 'in no circumstances investigation be carried out by an officer who is a complainant-- police officer himself'. In the facts before the Honourable Supreme Court, it was an investigation held by a Head Constable who was himself a person to whom bribe was alleged to have been offered, who lodged F.I.R. as informant. This was treated to be an infirmity which was bound to reflect on the credibility of the case. In the present case no such infirmity or incredibility in the case of the prosecution is pointed out. On the contrary on totality of the evidence led by the prosecution it is clear that the complainant P.I. Mr.P.M. Jadav who carried out the raid did comply with all the provisions of NDPS Act. The learned counsel for the accused is not able to point out violation of any mandatory provision which will vitiate the conviction of the accused. The learned APP Mr.Dave

is right in submitting that when no prejudice is pleaded or proved, even if there was some violation of a provision which is directory in nature, the case of the prosecution does not lose credibility. This Court is of the opinion that taking into consideration the totality of the case, taking into consideration the evidence on record of the case, credibility of the prosecution case is not lost even if the offence was investigated by Mr.N.N. Pathan, P.I. of NDPS Cell who also was a member of the raiding party.

14.3 In the present case Panchas have admitted their signature on the Panchnama. One of the Panchas Arjanji Chaganji, PW2, exh.14, has stated that he is shown Panchnama wherein he has signed at two places; one at the preliminary part of the Panchnama and the other at the end of the Panchnama, he has stated that he had signed chits marked 'A' and 'B'. He has deposed that each of the signature is of his own. In view of that taking into consideration the evidence of the members of the raiding party, taking into consideration the other material placed on record of the case, we find that the case of the prosecution is credible.

15. Mr.Barot, the learned advocate relied upon the decision of this Court in the matter of Shivabhai Gajmalbhai v. State of Gujarat (supra) and contended that there was violation of the provisions of section 102(3) of the Code of Criminal Procedure and as was held by the Division Bench of this Court that even if it is assumed that the provisions of sec.102(3) are directory there must be substantial compliance thereof. Mr.Barot quoted para 4 from the said judgement, which reads as under:

> "4. Under sec.52(3) of the NDPS Act, the person arrested and the article seized are required to be forwarded to the officer in charge of the nearest Police Station or the officer empowered under sec.53 thereat without unnecessary delay. Subsection (4) thereof enjoins a duty upon the authority or the officer to whom any person or article is forwarded inter alia under subsec.(3) to take such measures as may be necessary for the disposal according to law of such person or article. Section 51 thereof provides for applicability of the provisions of the Cr.P.C. inter alia to arrests and seizures under the NDPS Act to the extent they are not inconsistent with those contained in the latter enactment. Section 102(3) of the

> Cr.P.C. inter alia requires a report of the seizure to be made forthwith by the concerned police officer to the Magistrate having jurisdiction. Looking to the aforesaid provisions of law, there is no escape from the conclusion that a police officer acting under sec.42 of the NDPS Act by effecting arrest of a person and seizure of an article from such person for the purposes of the Act has to report forthwith to the Magistrate having jurisdiction. We are not shown any provision under the NDPS Act inconsistent with Sec.102(3) of the Cr.P.C."

15.1 There the Court was dealing with the contention raised with regard to section 52(3) of the NDPS Act and also with regard to provisions of sec.102(3) of the Code of Criminal Procedure. In sec.52(3) of the Act the words are, "officer in charge of the nearest Police Station". In the present case as discussed hereinabove the raiding party did bring papers of muddamal and the accused persons to Gandhinagar Zone Police Station and handed over the same to the officer in charge. So far as compliance with sec.102(3) of the Code of Criminal Procedure is concerned, in the case before the Division Bench there was total non compliance, in making a report to the Magistrate having jurisdiction. In the present case a report was made to the learned Chief Metropolitan Magistrate, Ahmedabad and not only that, remand was also sought for which was granted. Therefore, in the present case it cannot be said that the matter was not reported to the Magistrate having jurisdiction. In view of the facts, the aforesaid decision is not applicable to the facts of this case.

16. In view of the aforesaid discussion, it is clear that in the present case the raiding party carried out the raid in presence of the Panchas, one of whom has admitted his signatures not only in the 'preliminary part' of the Panchnama but also at the end of the Panchnama. He has also admitted his signatures on the slips affixed on the muddamal. The prosecution is able to prove the guilt of the accused persons. It is also clear from the record that the learned Additional Sessions Judge has committed an error in convicting the accused for the offences punishable under section 17 of the NDPS Act. We have noticed that section 17 of the NDPS Act provides for punishment for contravention in relation to prepared opium. Prepared opium is defined in subclause (b) of clause (xvi) of section 2 of the Act. The words, "prepared opium" means,

"Any product of opium obtained by any series of operations designed to transform opium into an extract suitable for smoking and the dross or other residue remaining after opium is smoked."

16.1 The word, 'prepared' denotes a completed or manufactured article and not an article in the process of preparation. In the present case what was recovered from the accused was 'opium'. Therefore, the conviction of the accused under section 17 of the NDPS Act is quashed. The accused no.1, i.e. appellant in Criminal Appeal No.643 of 1997 is convicted for offence punishable under section 18 of the NDPS Act. Whereas accused no.2, i.e. appellant in Criminal Appeal No.712 of 1997 is convicted under section 18 read with section 29 of the NDPS Act.

17. For the foregoing reasons Criminal Appeal No.643 of 1997 partly succeeds. The conviction of the appellant of this Appeal recorded under section 17 of the Narcotic Drugs and Psychotropic Substances Act, 1985 is quashed and set aside. However, the conviction under section 18 of the said Act as well as the punishment imposed is maintained. Muddamal be disposed of in terms of the directions given by the learned Sessions Judge in the impugned judgement and order.

18. Criminal Appeal No.712 of 1997 also partly succeeds. The conviction of the appellant of this Appeal recorded under section 17 of the NDPS Act is quashed and set aside. However, the conviction under section 18 read with section 29 of the said Act as well as the punishment imposed is maintained. Muddamal be disposed of in terms of the directions given by the learned Sessions Judge in the impugned judgement and order.

(Kshitij R. Vyas, J.)

(Ravi R. Tripathi, J.)

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